

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-1463

To be argued by
MILTON S. GOULD

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

PASCHAL DEMAURO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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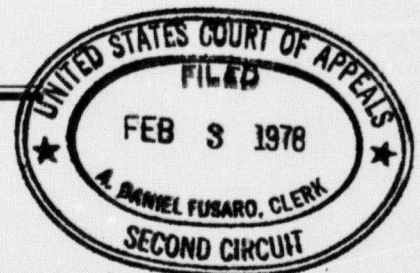


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
Preliminary Statement.....	1
REPLY TO STATEMENT OF FACTS.....	2
A. James Woop.....	3
B. Samuel Roberto.....	4
C. The Kelly Incident.....	5
D. The Anonymous Telephone Call, the Alleged Subsequent Conver- sation With Campisi, and the Meeting With Egan and Collishaw.....	6
E. Crimes of Other Entities and Individuals.....	7
F. The Defense Case.....	9
REPLY TO POINT I -	
THE ALLEGEDLY FALSE STATEMENTS WERE NOT MATERIAL TO THE GRAND JURY'S INQUIRY	10
A. Answer [1].....	19
B. The Kelly Incident--Answers [4]-[6].....	20
C. Answers [2], [3], [7]-[13].....	21

TABLE OF CONTENTS - Continued

	<u>Page</u>
REPLY TO POINT II -	
MARTIN'S CONVERSATIONS WITH THE DEFENDANT WERE SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE.....	23
A. Demauro Believed Martin to be His Attorney.....	23
B. The Conversation Took Place in Connection with the Render- ing of Legal Services.....	25
C. Confidentiality.....	27
REPLY TO POINT III -	
THE QUESTIONING WHICH ELICITED THE ALLEGEDLY FALSE STATEMENTS DID NOT MEET THE REQUIREMENTS OF BRONSTON v. UNITED STATES AND/OR DEFENDANT'S ALLEGEDLY FALSE ANSWERS WERE LITERALLY TRUE.....	29
CONCLUSION.....	32

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Bronston v. United States</u> , 409 U.S. 352 (1973)	2, 29, 31
<u>Brown v. United States</u> , 245 F.2d 549 (8th Cir. 1957)	11
<u>Burlington Industries v. Exxon Corp.</u> , 65 F.R.D. 26 (D. Md. 1974)	27
<u>City of Philadelphia v. Westinghouse Electric Corp.</u> , 210 F.Supp. 483 (E.D. Pa. 1962), mandamus and prohibition denied sub. nom. <u>General Electric v. Kirkpatrick</u> , 312 F.2d 742 (3d Cir. 1962), <u>cert. denied</u> , 372 U.S. 943 (1963)	24
<u>Egan v. United States</u> , 137 F.2d 369 (8th Cir.), <u>cert. denied</u> , 320 U.S. 788 (1943)	16
<u>Eutectic Corp. v. Metco, Inc.</u> , 61 F.R.D. 35 E.D.N.Y. 1973)	27
<u>In re Grand Jury Proceedings (Jackier)</u> , 46 U.S.L.W. 2107 (E.D. Mich., Aug. 2 1977)	25
<u>In re Grand Jury Subpoena Duces Tecum</u> , 391 F.Supp. 1029 (S.D.N.Y. 1975)	23
<u>J.C.B. Super Markets, Inc. v. United States</u> , 530 F.2d 1119 (2d Cir. 1976)	14, 16
<u>Standard Oil Co. v. United States</u> , 307 F.2d 120 (5th Cir. 1962)	15
<u>Steere Tank Lines, Inc. v. United States</u> , 330 F.2d 719 (5th Cir. 1963)	16
<u>United States v. Chapin</u> , 515 F.2d 1274 (D.C. Cir. 1975), <u>cert. denied</u> , 423 U.S. 1015 (1975)	30
<u>United States v. Damato</u> , 554 F.2d 1371 (5th Cir. 1977)	11

TABLE OF AUTHORITIES - continued

<u>Cases</u>	<u>Page</u>
<u>United States v. George F. Fish, Inc.,</u> 154 F.2d 798 (2d Cir.), <u>cert. denied</u> , 328 U.S. 869 (1946)	10
<u>United States v. Koonce</u> , 485 F.2d 374 (8th Cir. 1973)	11
<u>United States v. Long</u> , 534 F.2d 1097 (3d Cir. 1976)	29
<u>United States v. Mancuso</u> , 485 F.2d 275 (2d Cir. 1973)	11, 17
<u>United States v. Ridglea State Bank</u> , 357 F.2d 495 (5th Cir. 1966)	16
<u>United States v. Silverman</u> , 430 F.2d 106, <u>modified</u> , 439 F.2d 1198 (2d Cir. 1970), <u>cert. denied</u> , 402 U.S. 953 (1951)	25
<u>United States v. Slawik</u> , 548 F.2d 75 (3d Cir. 1977)	29, 31
 <u>Statutes:</u>	
18 U.S.C. § 1623	1
31 U.S.C. § 1058	15
 <u>Miscellaneous:</u>	
2 Weinstein & Berger, <u>Weinstein's Evidence</u>	26, 27
8 Wigmore, <u>Evidence</u> § 2296 (McNaughton rev. 1961)	26, 27

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1463

UNITED STATES OF AMERICA,

Appellee,

-against-

PASCHAL DEMAURO,

Defendant-Appellant.

DEFENDANT-APPELLANT
PASCHAL DEMAURO'S REPLY BRIEF

Preliminary Statement

This brief is submitted on behalf of Paschal Demauro ("Demauro"), defendant-appellant herein, for the purpose of replying to some of the factual statements and legal arguments made by the prosecution in its brief.

The defendant contends that the judgment of conviction of perjury (18 U.S.C. § 1623) entered herein should be reversed for the following reasons:

(1) the allegedly false statements were immaterial to the grand jury's inquiry;

(2) the Court erroneously permitted testimony by the prosecution witness John S. Martin, Jr. ("Martin") despite the assertion by the defendant of the attorney-client privilege; and

(3) the questioning which elicited the allegedly false statements did not meet the requirements of Bronston v. United States, 409 U.S. 352 (1973), and/or defendant's allegedly false answers were literally true.

REPLY TO STATEMENT OF FACTS

As noted in defendant's main brief ("main br."), the testimony which Judge Tenney ultimately found to be perjurious herein related to four limited topics: (1) when Demauro first "learned" that "money-washing or the exchange of...small bills for large" was going on at Chemical Bank ("Chemical"); (2) the contents of an anonymous call received by Demauro on April 8, 1974 regarding one Spinelli, the branch manager of a Chemical branch in the Bronx (Branch 107) who reported to defendant; (3) an incident in which a Chemical employee, Paul Kelly ("Kelly"), was questioned by

the IRS in 1973; and (4) the extent to which Demauro had made inquiries regarding money exchanging at Chemical (main br. 3). The prosecution's brief ("pros. br.") recites the testimony of a parade of witnesses whose testimony had little or nothing to do with these topics. Further, although the prosecution summarizes at great length the testimony herein, it points to no testimony which demonstrates the materiality of the allegedly false statements under the theory it espouses (Reply to Point I, infra).

A. James Woop

The prosecution summarizes the testimony of a Chemical employee James Woop regarding an alleged conversation with Demauro in 1968 or 1969 (pros. br. 3-4). Yet, it is undisputed that:

(1) the District Court found that Demauro testified truthfully in responding to the one question he was asked regarding the conversation in question (55a*);

(2) the conversation in question took place (at the latest) five years prior to the effective date of the Bank Secrecy Act (the "Act") (62a); and

* Numbers in parentheses followed by "a" refer to the appendix; preceded by "Tr." to the transcript.

(3) in the conversation in question, Woop referred only to "rumors" of money exchanging.*

B. Samuel Roberto

The prosecution discusses an alleged conversation between another Chemical employee Samuel Roberto and Demauro (pros. br. 4-5) despite the facts that Judge Tenney found that Demauro testified truthfully to the questions he was asked regarding this conversation (55a) and stated that "Roberto...testified at the trial that he did not discuss money washing with Demauro" (Id.), accurately reflecting Roberto's testimony (Tr. 201-202).** The alleged Roberto-Demauro conversation is simply irrelevant to the issues in the instant appeal.***

* The prosecution further refers to Woop's testimony regarding his own involvement in money exchanging in 1973 (pros. br. 4, n.(*)). There is not a scintilla of evidence that Demauro was aware of these later money-exchanging activities.

** Thus, the prosecution's statement that "Roberto...first learned of exchanging at...branch [94] in 1968..." (pros. br. 4) is entirely gratuitous, since Roberto specifically testified that he did not communicate this knowledge (or any other knowledge of money exchanging) to Demauro.

*** Again the prosecution refers to Roberto's testimony regarding his own involvement in money exchanging (pros. br. 5, n.(*)), despite the fact that there is no evidence that Demauro had any knowledge of these activities which took place four years after the conversation in question.

C. The Kelly Incident

The prosecution's brief discusses Demauro's knowledge of money exchanging by another Chemical employee, Kelly. The following facts regarding the Kelly incident are undisputed:

(1) Demauro did not learn of Kelly's money exchanging until 1973 when Kelly contacted Demauro after being interviewed by IRS agents (31a);

(2) Upon being informed by Kelly of his involvement in money exchanging, Demauro told him to contact the Chemical legal department, which he did (Id.);

(3) Kelly was subsequently interviewed again by the IRS in the presence of an attorney from Chemical and again told of his money exchanging activities (34a-35a);* and

(4) Kelly's involvement in money exchanging took place in 1969 (29a), five years prior to the effective date of the Bank Secrecy Act (62a), and he did not again engage in such transactions (Tr. 232).**

* Kelly subsequently (in October 1973) testified before a grand jury regarding his money exchanging. (Tr. 220).

** The exchanges by Kelly were for one Stanzione who was a customer of Chemical and maintained accounts at Kelly's branch (29a-31a; Tr. 222-224). See Reply to Point I, infra.

D. The Anonymous Telephone Call,
the Alleged Subsequent Conver-
sation With Campisi, and the
Meeting With Egan and Collishaw

As discussed in defendant's main brief (pp. 18-19), the contents of the anonymous telephone call received by Demauro on April 8, 1974 (pros. br. 7) were immaterial to the grand jury's inquiry under the prosecution's theory of materiality. Reply to Point I, infra. There is simply no evidence that the anonymous caller mentioned money exchanging by Spinelli or any other employee of Chemical. Further, on the following day (April 9), Demauro discussed the contents of the anonymous call with IRS agent Thomas Egan (Tr. 34) and his superior at Chemical Robert Collishaw (Tr. 101-102). In this conversation (and following the alleged telephone conversation with Michael Campisi (pros. br. 7-8)), Demauro, Collishaw, and Egan further discussed the problem of compliance with the Bank Secrecy Act (10a-11a; Tr. 33-40, 101-106). The following week, at Collishaw's direction, Demauro discussed the necessity of preventing the laundering of narcotics money with the branch managers of the Chemical branches in the Bronx (12a-13a). Judge Tenney found that Demauro's answers with regard to his meeting with Collishaw and Egan were not false (52a-53a). Judge Tenney stated:

... Egan did not specifically refer to money exchanges going on at a specific branch, nor did he specifically tell Demauro and Collishaw that he suspected that Spinelli was doing it or that it was being done in a number of Chemical branches...

(52a).

Thus, the prosecution's assertion that Demauro "had not taken effective steps to see to it that employee participants [in money exchanging] were stopped and disciplined" (pros. br. 10) is unsupported by the record. Upon learning of Kelly's money exchanging, he advised Kelly to contact the Chemical legal department, which he did. Immediately following the anonymous telephone call and the alleged telephone conversation with Campisi, he discussed the problem of money exchanging with Collishaw and Egan and subsequently with the branch managers.*

E. Crimes of Other Entities and Individuals

The prosecution refers to the indictment of and subsequent plea of guilty to a superseding information by Chemical. There is no evidence in the record that any action or

* With regard to the prosecution's allegation that "Demauro never took any action--investigative or otherwise--with respect to Spinelli" (pros. br. 10, n.(*)), it is difficult to imagine what action the prosecution contemplated Demauro taking since he knew that his superior Collishaw was as cognizant of the IRS investigation of Spinelli as he was.

non-action by Demauro contributed to the consistent pattern of violation of the Bank Secrecy Act by Chemical. Rather, the reasons for Chemical's non-compliance, as described by counsel for Chemical (main br. 23, n.(*)), were entirely outside Demauro's area of responsibility.

The prosecution further refers to tax violations by Spinelli, one Michael Strolla, and D'Ambrosio who is further described as a "narcotics dealer" and "fugitive" (pros. br. 15). There is not a scintilla of evidence in the record that Demauro knew that Spinelli had received a "cash bribe" for money exchanging (if indeed Spinelli was bribed). There is no evidence in the record that Demauro knew anything about any activities of Strolla, much less that he was bribed to exchange money. There is no evidence that Demauro knew anything about D'Ambrosio's involvement with narcotics beyond what he was told by IRS agent Egan on April 9 in the presence of Collishaw.*

* Indeed, even accepting the prosecution's version of the Campisi-Demauro telephone conversation on April 9, Campisi told Demauro that Spinelli:

... knew D'Ambrosio that he had been in a couple of times but I didn't indicate to Mr. DeMauro that there was any wrongdoing at 107, and I also felt that he was not involved with drugs or narcotics per se.

(Tr. 242).

F. The Defense Case

The prosecution purports to find the evidence of Demauro's activities from July to October 1974 and in 1975 of little relevance (pros. br. 16). The relevance of this testimony was that from the time the Bank Secrecy Act became effective in June 1974 (62a), Demauro, who under the prosecution's theory of materiality was the key to Chemical's non-compliance with the Act, had only limited contact with the Bronx/Upper Manhattan Branches and had duties entirely unrelated to compliance with the Act.

REPLY TO POINT I

THE ALLEGEDLY FALSE STATEMENTS WERE NOT MATERIAL TO
THE GRAND JURY'S INQUIRY

The prosecution apparently concedes that were normal standards of corporate criminal liability applied to Chemical (See United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir.), cert. denied, 328 U.S. 869 (1946) (main br. 15-16)), Demauro's allegedly false statements would be immaterial to Chemical's criminal liability. In defending Judge Tenney's view that a higher standard of criminal liability (i.e., that in order for Chemical to be in violation of the Act, it was necessary for Demauro to be "cognizant of the substantial risk" (emphasis Judge Tenney's) that money exchanging would continue after June 1974), the prosecution employs a two-step argument:

(1) "The employees who had exchanged money [presumably after the effective date of the Act] had been bribed to do so" (pros. br. 24); and

(2) Acceptance of money rendered the exchanges "outside the scope of employment" of the employees, and therefore would require that a higher standard of liability be applied to Chemical (Id.).

The first step of this argument is entirely unsupported by the record herein. The second step is incorrect as a matter of law.* The prosecution has therefore failed to meet its burden of establishing the materiality of Demauro's allegedly false testimony beyond a reasonable doubt (United States v. Koonce, 485 F.2d 374, 381 (8th Cir. 1973)) "by clear, convincing and direct evidence" (Brown v. United States, 245 F.2d 549, 556 (8th Cir. 1957)).

With regard to the assertion that the Chemical employees who exchanged money had been bribed to do so, the record is silent. As this Court stated in United States v. Mancuso, 485 F.2d 275, 281 (2d Cir. 1973), materiality is to be determined on the basis of an examination of "the nature of the inquiry" at which the testimony was given and the evidence introduced at trial to prove its falsity." Allegations of materiality in an appellate brief unsupported by the record are insufficient to meet this standard. United States v. Damato, 554 F.2d 1371, 1373 (5th Cir. 1977).

* The prosecution ultimately does not take the position that the second step in its argument is a correct statement of the law. Rather, it describes the second step as a "substantial argument" that could potentially be raised by Chemical (pros. br. 24). The notion that potential defenses of Chemical, no matter how non-meritorious, could establish the materiality of Demauro's allegedly false statements is a novel one, for which the prosecution cites no authority. See also pros. br. 25, n.(*).

Initially it should be noted that the prosecution must establish that the exchanges which took place after the effective date of the Act were the result of bribes. If the prosecution is asserting that the testimony of defendant herein was material because the pre-June 1974 transactions about which he allegedly knew were the result of bribes (which again the record does not support, see discussion infra), it begs the question. Rather, the prosecution's argument must be that Demauro's testimony was material because his cognizance of a substantial risk that violations of the Act would occur was a prerequisite to Chemical's criminal liability because the violations of the Act were outside the scope of employment since these exchanges were allegedly the result of bribes.* The record is silent as to whether the post-June 1974 money ex-

* The District Court's formulation of the prosecution's argument indicates its nature and defect:

With this background, it becomes clear why inquiries of Demauro about his knowledge of pre-June, 1974 money-washing were so important to the grand jury's investigation. Since the amounts washed at any one time amounted anywhere from \$10,000 to \$250,000, the bank employees were obviously receiving substantial amounts of money for the service they provided.

(emphasis supplied, 60a). Yet, the assertion that bank employees were receiving substantial amounts of money is not "obvious" and is unsupported by the record. To the extent that any conclusion can be drawn from the evidence in the record relating to pre-June, 1974 transactions, it is the opposite conclusion. See discussion in text.

changes at Chemical were the result of bribes.* The prosecution's theory cannot therefore establish the materiality of Demauro's allegedly false testimony.

Even assuming the exchanges which were the subject of Demauro's allegedly false testimony were relevant, the record demonstrated neither that such exchanges were the result of bribes nor that they were outside the employees' scope of employment. Kelly allegedly exchanged for Stanzone who maintained an account at Chemical (29a-30a). Kelly's sole testimony with regard to "bribes" was that "Thanksgiving, I know I got about \$20, a bottle, and Christmas I got either 25 or \$50" (30a). There is no suggestion in the record that these "bribes," rather than the fact that Stanzone maintained an account at Chemical, caused Kelly to exchange money for him.**

* Indeed, in pleading guilty to 445 misdemeanor counts resulting from violations of the Act, Chemical's counsel attributed Chemical's non-compliance to numerous factors but did not mention bribery (main br. 23 n.(*)).

** There is no allegation that Demauro was aware of the gratuities received by Kelly

The District Court also found that Demauro learned from Woop in 1969 that the exchange of money was going on at Chemical although Woop mentioned no names (49a). There was no evidence that bribes or gratuities were involved

[Footnote continued on next page.]

With regard to the second step in the prosecution's argument--that the alleged bribery rendered the employees' exchanges outside the scope of their employment--the prosecution's burden is to demonstrate not that the employees' failure to report the exchanges was outside the scope of their employment but, rather, that the exchanges themselves were outside the scope of their employment. As this Court stated in J.C.B. Super Markets, Inc. v. United States, 530 F.2d 1119, 1122 (2d Cir. 1976), to argue that the violation of a statute is beyond an employee's scope of employment proves nothing:

[Footnote continued from previous page.]

in these exchanges. Woop testified that on one occasion in 1973 he received \$125 for exchanging money (Tr. 183). There is no allegation that Demauro was aware of this transaction, and his testimony was not found to be false on the basis of it.

The District Court found that Campisi told Demauro in the April 8 telephone conversation that money exchanging was going on all over the Bronx (53a). There was no evidence that the exchanges in question were the result of bribes. Campisi testified that "on a few occasions" he received \$50 and "a couple of occasions probably \$100" in connection with money exchanging (Tr. 239) but Demauro was not aware of this, and indeed Campisi led Demauro to believe that he himself was not involved in money exchanging (Tr. 279).

Finally, a Chemical employee Dekeersmacher and Roberto testified to receiving small sums in connection with money exchanging (Tr. 195, 207). There was no evidence that these individuals discussed their money exchanging with Demauro, much less that he was aware of any money received by them.

The suggestion that the employee's wrongful act did not advance the interests of the employer and therefore should not be imputed to it entirely overlooks the basic concept of respondeat superior. Presumably no tortious act by an agent redounds to the benefit of the principal where the latter is held responsible for the damage which results. Yet if this reasoning were followed no principal would ever be liable. Obviously, the corporate entity here can only act through its agents and there is no question but that both Miss Gainer and Mr. Cusack were authorized to make sales. If the fact that they were not authorized to make illegal sales would exculpate the employer, it would be practically impossible to impose any penalties under the statute. The precise point was decided against a retailer in Marbro Foods, Inc. v. United States, 293 F. Supp. 754 (N.D. Ill. 1968).

530 F.2d at 1122.

None of the cases cited by the prosecution (pros. br. 22) establish the proposition that the acceptance of a bribe by a bank employee in connection with the exchange of money for a customer of the bank renders such an act outside the scope of that employee's employment. In Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962), the corporation was held not liable for criminal violations arising out of the theft by its employees of the corporation's oil. The analogy in banking would be embezzlement not the exchange of money for a bank customer.*

* A further distinction between the Standard Oil case and the situation herein is that the statute in Standard Oil required that the act be done "knowingly" by the corporation, while the statute herein requires that the corporation act "willfully". Compare 307 F.2d at 126 with 31 U.S.C. § 1058.

Indeed, in United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966), a bank was held not liable for criminal violations resulting from the diversion of FHA-insured loan proceeds by a bank employee to himself and his confederates. In three of the cases cited by the prosecution (J.C.B. Super Markets Inc. v. United States, 530 F.2d 1119 (2d Cir. 1976); Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963); Egan v. United States, 137 F.2d 369, 379 (8th Cir.), cert. denied, 320 U.S. 788 (1943)), corporate criminal liability was upheld. As this Court stated in J.C.B. Super Markets, in upholding the imposition of penalties on a corporation for violation of the rules of the food stamp program:

Appellant further argues that this is not a case of awarding actual damages to a third party because of the tortious conduct of an agent but involves a punitive or penal sanction so that normal respondeat superior liability should not be imposed. We have necessarily recognized the general rule that where punitive damages are to be imposed, the principal must be shown to be somehow involved in the wrongdoing. Fort v. White, 530 F.2d 1113 (2d Cir. 1976). We do not think the issue here is analogous. JCB had been authorized to participate in the Food Stamp Program which has the laudable aim of raising the nutritional levels of low income families. The abuse of that program by employees authorized to act JCB suffices to inculcate the corporation.

530 F.2d at 1122. Similarly herein Chemical was liable for violations of the Bank Secrecy act in connection with the ex-

change of money by its employees for bank customers and could not claim that such exchanges were beyond the employee's scope of employment.

Finally, as discussed in defendant's main brief (pp. 1 even accepting the prosecution's theory that Demauro's cognizance of a substantial risk that the Act would be violated was a prerequisite to Chemical's liability,* Demauro's testimony

* The prosecution's suggestion that Demauro's allegedly false testimony could somehow be material to investigation by the grand jury of narcotics, tax, and Bank Secrecy Act violations by individuals other than Chemical (pros. br. 25, n.(*)) must be rejected. In order for materiality to be established, the prosecution must establish beyond a reasonable doubt based on the nature of the inquiry at which the testimony was given and the evidence introduced at trial that the allegedly false answer impeded the grand jury's investigation. United States v. Mancuso, 485 F.2d 275 (2d Cir. 1973). No evidence at the trial herein demonstrated that Demauro's allegedly false answers could have had any bearing on an investigation into violations of the narcotics or tax laws or of the Bank Secrecy Act by anyone other than Chemical. See discussion at p. 8, supra.

Perhaps the best evidence of the state of the record with regard to the prosecution's suggested alternative theories of materiality is that the "cognizance of substantial risk" theory was the sole basis on which the District Court found Demauro's allegedly false testimony material (58a-61a) and has been the sole theory of materiality consistently argued by the prosecution. As the prosecutor stated in his opening statement:

He was asked these questions because, as your Honor will hear, it was important for the grand jury to determine whether the defendant was aware

[Footnote continued on next page.]

was immaterial. Nothing in the record suggests what Demauro could or should have done (in addition to the steps he did take) to bring Chemical into compliance with the Act. Typically, the prosecution finds significance in the fact that Demauro:

... had been advised in April 1974 by a Government Agent that bank officers were receiving 1 to 3% of the proceeds for washing huge amounts of currency for narcotics dealers throughout the country and that the Government expected that compliance with the Bank Secrecy Act would put an end to the practice;

[Footnote continued from previous page.]

that there was a substantial risk that the Bank Secrecy Act would not be complied with because Chemical Bank employees were being and had been over a number of years bribed to keep this sort of exchange of money secret.

(Tr. 8). See also Government's Summation, p. 2 (incorporating by reference Government's [Pretrial] Memorandum in Opposition to Defendant's Motion to Dismiss the Indictment, p. 5).

The Prosecution's further suggestion (p. 25 n.(*)) that absent proof of Demauro's knowledge, the grand jury would have found Chemical "technically liable" but not returned an indictment must similarly be rejected. It is uncontradicted that the grand jury had before it evidence of massive violations of the Act by Chemical entirely unrelated to Demauro or the exchanges testified to herein (main br. 8-9, 22-23). (Indeed, the grand jury indicted Chemical despite Demauro's allegedly false testimony.) To suggest in these circumstances that the grand jury would not have indicted Chemical but for evidence of Demauro's knowledge is absurd.

Finally, as noted above (p. 11 n.(*)), the prosecution's unsupported theory that potential defenses of Chemical could serve to establish the standard of materiality herein must be rejected.

(pros. br. 26). Yet, Demauro's superior Collishaw was present on the occasion when Demauro met with the "Government Agent" (Egan) and had access to the same advice (10a-11a; Tr. 33-40, 101-106). The following week, at Collishaw's direction, Demauro discussed the necessity of preventing the laundering of narcotics money with the branch managers of the Chemical branches in the Bronx (12a-13a). Neither does the prosecution's "individual analysis" of Demauro's responses demonstrate their materiality.

A. Answer [1]*

The prosecution alleges that the answer to question one was material in that a truthful answer would have revealed that Demauro allegedly learned in 1968 or 1969 from Woop that money exchanging was going on; his alleged awareness that Kelly had exchanged money in 1969; and his alleged knowledge from the Campisi telephone conversation that money exchanging was going on all over the Bronx (pros. br. 27). The reasons why this information was immaterial to the grand jury's inquiry have been set forth in defendant's

* The numbering of the answers is the same as in defendant's main brief (pp. 4-8) and in the prosecution's brief (pp. 12-15).

main brief (Woop: p. 22 n.(*); Kelly: pp. 19-20; Campisi: pp. 21-22) and will not be repeated here. None of these alleged facts tended to prove either Demauro's awareness of a substantial risk that the Act would be violated or that Demauro did not take all necessary steps to see that the Act was not violated.*

B. The Kelly Incident
-- Answers [4]-[6]

The reasons why the inquiries as to the Kelly incident were immaterial have been set forth in defendant's main brief (pp. 19-20) and above (p. 5). The prosecution's analysis of this incident (pros. br. 28) does not establish

* With regard to this answer, the prosecution repeats its suggestion that the question was material to the investigation of income tax and narcotics violations (pros. br. 27, n.(*)). The suggestion that Demauro's false testimony hindered the grand jury's identification of Campisi, Kelly, and Woop (also made at pros. br. 30, n.(*)) is specious, since all three of these individuals were the subject of succeeding questions. The grand jury was obviously aware of the identity of these individuals. Even under the prosecution's version of the truthful answer to this question, Demauro was not aware that any individuals at Chemical were receiving cash payments or of D'Ambrosio's involvement in narcotics beyond what he was told by Egan in Collishaw's presence on April 9 (p. 8, supra).

its materiality.*

C. Answers [2], [3], [7]-[13]

The immateriality of the questions relating to the anonymous telephone call and the telephone conversation with Campisi has been discussed in defendant's main brief (pp. 18-19, 21-23).** The prosecution asserts that Demauro's testi-

* The prosecution asserts that despite the fact that Chemical's legal department was fully aware of Kelly's activities, the questions relating to Kelly were material because Demauro had also received information from Woop and Campisi (pros. br. 28, n.(*)). Demauro allegedly received the information from Woop--that Woop had heard rumors of unnamed individuals engaging in money exchanging--four or five years prior to his conversation with Kelly (49a, Tr. 182). With regard to the information allegedly received from Campisi, Demauro discussed the problem of compliance with the Act on the following day with Collishaw (10a-11a; Tr. 33-40, 101-106). The prosecution's suggestion that Demauro was more aware of a substantial risk that the Act would not be complied with than the legal department (when a Chemical attorney had been present when Kelly admitted exchanging money to the IRS (35a)) must be rejected.

** The prosecution asserts that the Campisi telephone conversation was material because the steps Demauro took to stop money exchanging at Chemical were "ineffective" (pros. br. 29, n.(*)). The steps Demauro took were "ineffective" in the sense that Chemical ultimately pleaded guilty to numerous violations of the Act, necessarily occurring after April 1974. However, the causes of Chemical's violations were entirely unrelated to Demauro (main br. 23, n.(*)). No showing has been made as to what steps Demauro could have taken to prevent these violations. Indeed, it is precisely because the steps Demauro did take and could have taken were ineffective to prevent Chemical from violating the Act that his testimony was immaterial to an investigation of Chemical's liability for such violations. Further, it should be noted that the steps Demauro did take were at the direction of his superior Collishaw (12a-13a).

mony regarding the anonymous call was material because it would have enabled Demauro to discern in some unexplained manner from his conversation with Egan that Spinelli was involved in money exchanging. Contrary to the statement in the prosecution's brief (p. 30), Egan specifically testified that he did not tell Demauro and Collishaw that Spinelli was exchanging money (Tr. 71). Even under the prosecution's version of the Campisi-Demauro telephone conversation, Campisi did not inform Demauro that Spinelli was involved in money exchanging. There is simply no basis for the prosecution's suggestion that Demauro knew or should have known that Spinelli was involved in money exchanging.

The false statements alleged were therefore immaterial to the grand jury's inquiry.

REPLY TO POINT II

MARTIN'S CONVERSATIONS WITH
THE DEFENDANT WERE SUBJECT TO
THE ATTORNEY-CLIENT PRIVILEGE

The lower court erroneously permitted testimony by the prosecution witness Martin despite the assertion by the defendant of the attorney-client privilege (main br. 26-32). The prosecution asserts that the defendant failed to establish three elements of the privilege: (1) that he believed Martin to be his attorney; (2) that he sought legal advice from Martin; and (3) that he expected his responses to Martin to be kept confidential (pros. br. 33).

A. Demauro Believed Martin
to Be His Attorney

The prosecution argues that the fact that Martin testified that he was retained by Chemical (15a) is decisive as to whether Demauro could assert the attorney-client privilege. However, as discussed in defendant's main brief, an attorney may have joint clients. In re Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029, 1033 (S.D.N.Y. 1975) (Law firm represented both corporation and employee in SEC investigation; "bona fide lawyer-client relationship" therefore exists and employee can assert privilege). Proposed Rule of Evidence 503(d)(5).

Herein, Demauro, a Vice President of Chemical, conferred with Martin, an attorney retained by Chemical regarding an internal investigation of the exchanging of currency in branches supervised by him. In these circumstances, Demauro rightly believed that the relationship between him and Martin was that of attorney and client.

Thus, Demauro does not seek to assert Chemical's privilege derivatively as stated by the prosecution (pros. br. 34, 37). Rather, Demauro asserts the privilege on his behalf. However, the fact that Chemical could also assert that the Martin-Demauro conversation was privileged* indicates that the elements required for the assertion of the privilege--such as confidentiality and consultation for the purpose of obtaining legal advice--were present.

* The prosecution suggests that under the "control group" test for the assertion of a corporate privilege (City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962), mandamus and prohibition denied sub nom. General Electric v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963)), the Demauro-Martin conversation would not be privileged since "no one has ever suggested that Demauro was in a position to contribute to any corporate decisions taken as a result of Mr. Martin's internal investigation" (pros. br. 35, n.(*)). The prosecution itself makes this "suggestion" in Point I of its brief in arguing that Demauro was in a position to prevent Chemical from violating the Act had he chosen to do so.

The cases discussed by the prosecution beg the question of whether Demauro currently believed that he was a client of Martin's. In the dicta quoted by the prosecution from United States v. Silverman, 430 F.2d 106, 122, modified, 439 F.2d 1198 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971) (pros. br. 36), this Court expressly did not rule as to whether a union president could assert the privilege when the attorney was retained to make a report to the union. Further, the document for which the privilege was claimed was the report itself not a communication between the union president and the attorney. Indeed, there is no indication in the opinion that the attorney ever communicated with the president in preparing the report.*

B. The Conversaton Took Place
in Connection with the Ren-
dering of Legal Services

The prosecution argues that since the conversation between Martin and Demauro involved "factual inquiries," it is not subject to the privilege (pros. br. 34). Manifestly, if conversations involving "factual inquiries" are

* Similarly, in In re Grand Jury Proceedings (Jackier), 46 U.S.L.W. 2107 (E.D. Mich., Aug. 2, 1977), the District Court found that the relationship of attorney and client did not exist between the employee and the attorney.

not subject to the privilege, no conversation between attorney and client is privileged. Attorneys do not render legal advice in a vacuum. Factual inquiry is a necessary predicate to the rendering of legal services.

The requirement that a privileged communication be made for the purpose of facilitating the rendition of professional legal services (Proposed Rule 503(b)) distinguishes those cases in which the attorney renders business or other non-legal advice from those situations in which he acts as a legal counsellor. 8 Wigmore, Evidence § 2296 (McNaughton rev. 1961). 2 Weinstein & Berger, Weinstein's Evidence ¶ 503(a)(1)[01] (1977).

Herein, Martin was manifestly not acting as a business or other non-legal advisor. He was retained in connection with the investigation of violations of the Act at Chemical by the United States Attorney's Office. He informed Demauero at the outset of their conversation that he was an attorney. The Demauero-Martin conversation manifestly took place in connection with the rendering of legal services. As Wigmore states:

...[T]he most that can be said by way of generalization is that a matter committed to a professional legal adviser is prima facie so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter,

and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.

(emphasis in original). 8 Wigmore, Evidence § 2296, p. 567 (McNaughton rev. 1961).

C. Confidentiality

The prosecution argues that the fact that Martin informed Demauro that he was conducting an internal investigation negated any reasonable expectation by Demauro that the conversation was privileged (pros. br. 34). To the contrary, Martin's description of the investigation as internal could only have served to heighten Demauro's expectations of confidentiality. Thus, intra-corporate distribution of documents does not render documents outside the attorney-client privilege. Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 38-39 (D.Md. 1974). Eutectic Corp. v. Metco, Inc. 61 F.R.D. 35, 39 (E.D.N.Y. 1973). 2 Weinstein & Berger, Weinstein's Evidence ¶ 503(b)[04] pp. 503-46 - 503-47. A corporate officer may legitimately have quite different expectations regarding intra-corporate disclosure of communications with an attorney than he has regarding disclosures to individuals

outside the corporation.* The scope of the privilege reflects these expectations. The communication herein was confidential for the purposes of the attorney-client privilege.**

The admission of the Martin testimony was reversible error.***

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- * Thus, the hypothetical ethical dilemmas of Martin described in the prosecution's brief (p. 37) are not incapable of resolution. In any event, neither the resolution nor the possible existence of these dilemmas can affect the availability of the privilege to Demauro.
- ** The alleged fact that Demauro lied to Martin (pros. br. 34, n.(*)) does not render the conversation outside the privilege. Again, if this were the law, numerous obviously protected attorney-client conversations would not be privileged.
- *** The error in admitting Martin's testimony was not harmless (See pros. br. 38, n.(*)). As described in defendant's main brief (p. 28), Judge Tenney relied on this testimony. Contrary to the statement in the prosecution's brief, the filing of a lawsuit by Demauro against Chemical and others did not by itself allegedly supply evidence of motive. Rather, under Judge Tenney's reasoning, the necessity to sustain the lawsuit by conforming his testimony before the grand jury to his conversation with Martin supplied the otherwise absent motive for Demauro to commit perjury. Judge Tenney thus relied on Martin's testimony.

REPLY TO POINT III

THE QUESTIONING WHICH ELICITED
THE ALLEGEDLY FALSE STATEMENTS
DID NOT MEET THE REQUIREMENTS
OF BRONSTON v. UNITED STATES
AND/OR DEFENDANT'S ALLEGEDLY
FALSE ANSWERS WERE LITERALLY TRUE

The questioning which elicited the allegedly false statements herein did not meet the requirements of Bronston v. United States, 409 U.S. 352 (1973), which makes precise questioning a predicate to any perjury conviction.

The prosecution's repeated response to defendant's Bronston argument is that this argument is foreclosed by the District Court's finding of fact that the minds of the questioner and witness met as to the meaning of any arguably ambiguous questioning. But such an argument obviously entirely undercuts the teaching of Bronston. In Bronston itself, the defendant had been convicted by a jury of perjury. The Supreme Court therefore obviously rejected the argument advanced by the prosecution herein.

In United States v. Slawik, 548 F.2d 75 (3d Cir. 1977), the court specifically rejected the argument that the cases relied upon by the prosecution herein (United States v. Long, 534 F.2d 1097, 1100 (3d Cir. 1976); United States

v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975)) overruled Bronston sub silentio:

[United States v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975) and United States v. Long, 534 F.2d 1097 (3d Cir. 1976)] address the question that necessarily arises when an answer would be true on one construction of an arguably ambiguous question but false on another: who decides which construction the defendant placed on the question? The solution offered by Long and Chapin, and by which we are bound, is that the petit jury decides.

But even as we eschew a broad reading of Bronston, so we decline to apply Long and Chapin in an overboard fashion. Chapin involved an "answer [that] was knowingly false under the only reasonable interpretation of the question ..." 515 F.2d at 1283. Long involved alleged ambiguity in the terms "bribes," "kickbacks" and "payoffs," terms which we held "are not terms of art, they are words of common currency which form part of the vocabulary of almost any American in his teens or older." 534 F.2d at 1100. But the questions asked to Slawick were not nearly as clear. In reversing the trial court's dismissal of the indictment in Long, we said that a charge of perjury may not be dismissed "when it is entirely reasonable to expect a defendant to have understood the terms used in the questions." Id. at 1101. In this case, defendant unsuccessfully moved the court for dismissal of the indictment on Count 8. We hold that this count, premised as it is on questions that were deliberately artless and vague, should have been dismissed, for it was entirely unreasonable to expect that the defendant understood the questions posed to him.

548 F.2d at 86. Similarly herein, defendant cannot be convicted of perjury on the basis of "questions that were deliberately artless and vague" (main br. 33-45).*

* The prosecution erroneously asserts that defendant does not contend that answers [7], [12] or [13] are defective under Bronston. Campisi's testimony indicated that answer [12] was literally true (main br. 44-45, Tr. 243). Answers [7] and [13] were in response to questions, which when viewed with the other questions relating to the Campisi telephone conversation (main br. 40-45), were insufficiently precise under Bronston.

CONCLUSION

For all of the foregoing reasons, and for the reasons stated in defendant's main brief, it is respectfully submitted that the judgment of the District Court should be reversed and a judgment of acquittal be directed and, in the alternative, that a new trial be ordered.

Respectfully submitted,

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United States Court of Appeals
for the Second Circuit

United States of America,

Appellee

against

Paschal Demauro,

Defendant-Appellant.

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:
Frank Nesbitt

, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 1020 Trinity Avenue, New York, New York

That on February 3, 1978, he served 2 copies of
Reply Brief
on

Robert B. Fiske, Jr.,
1 St Andrews Plaza,
New York, New York.

by delivering to and leaving same with a proper person or persons in
charge of the office or offices at the above address or addresses during
the usual business hours of said day.

Frank Nesbitt
.....

Sworn to before me this
3rd day of February, 19 78.

John V. D'Amico
JOHN V. D'AMICO
Notary Public, State of New York
No. 80-0932350
Qualified in Nassau County
Commission Expires March 28, 1979